Supreme Court, U. S.
FILED
AUG 24 1976
MICHAEL RODAK, JR., CLERK

No. 75-1895

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE DOW CHEMICAL COMPANY, PETITIONER

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC and NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

PETER BERNSTEIN,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1895

THE DOW CHEMICAL COMPANY, PETITIONER

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC and NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 530 F. 2d 266. The decision of the National Labor Relations Board (Pet. App. 39a-47a), adopting the decision of the administrative law judge (Pet. App. 48a-79a), is reported at 212 NLRB 333.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37a-38a) was entered on February 11, 1976. A petition for rehearing was denied, and a suggestion of rehearing *en banc* was rejected, on April 2, 1976 (Pet. App. 35a-36a). The petition for a writ of certiorari was filed on June 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer may resort to self-help, in addition to or instead of contractual grievance resolution machinery, when a union strikes in violation of a no-strike clause in a collective bargaining agreement.

STATEMENT

1. The facts are fully set forth in the Board's decision (Pet. App. 50a-70a). In May 1971 petitioner (the "Company") unilaterally promulgated a change in the working schedule of its latex department.[1] Respondent Union filed a grievance over the Company's unilateral schedule change, and the parties completed the first four steps of the grievance procedure specified in their collective bargaining agreement. As a result of the meetings conducted during the grievance procedure, the Company postponed the effective date of the schedule change until June 7 (Pet. App. 51a-56a).

The collective bargaining agreement between the Company and the Union contained a no-strike and no-lockout provision. This provision barred the Union from engaging in a work stoppage unless and until all five steps of the grievance procedure had been exhausted, the Union had made a written request for arbitration after receipt of the Company's response in the fifth step, and arbitration had been either completed or refused. The Union did not invoke Step 5 of the grievance procedure or file a written request for arbitration. Instead, the Union struck on June 7, when the new schedule was to be implemented (Pet. App. 56a-57a).

[1]The Company announced that the department would change from a schedule of seven days on the job and two days off to a regular five-day work week (Pet. App. 51a-53a).

During the strike the Company wrote its employees a series of letters. The letters requested the employees to return to work and stated that the contractual grievance machinery should be used to resolve the dispute (Pet. App. 58a-59a).

The employees did not heed the call to return to work, and the Union did not urge them to do so. On July 23 the Company wrote the employees a letter informing them that it would begin hiring permanent replacements on July 29. By letter of August 9, the Company rescinded the collective bargaining agreement. On August 17 the Company discharged all of the striking employees. During the next 10 days a majority of the workers then employed by the Company in the bargaining unit signed a petition stating that they did not desire to be represented by the Union. Relying on this petition, the Company withdrew recognition from the Union (Pet. App. 56a-63a).

2. The Board concluded that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, 61 Stat. 136, as amended, 29 U.S.C. 158(a)(5) and (1), by unilaterally changing the work schedule of the latex employees.[2] The Board further found that the strike violated the no-strike clause of the collective bargaining agreement because the "contract grievance procedure was available for the peaceful resolution of the dispute" but the Union "failed to submit the dispute in accordance with" that procedure (Pet. App. 71a).

The Board applied the rule of *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, as interpreted in *Arlan's Department Store of Michigan, Inc.*, 133 NLRB 802, 807, that "only strikes in protest against

[2]Member Fanning agreed with this finding but dissented from the remainder of the Board's decision (Pet. App. 41a-47a).

serious unfair labor practices should be held immune from general no-strike clauses." It held that the Company's unilateral conduct, although an unfair labor practice, "was not of such serious nature as to be 'destructive of the foundation on which collective bargaining must rest' " (Pet. App. 70a-71a, quoting from *Mastro Plastics, supra*, 350 U.S. at 281). The Union's breach of the no-strike provision therefore was not excused by the Company's unfair labor practice, and the strike was "unprotected from its inception" (Pet. App. 71a). Finding that the Union's breach of the no-strike clause was material, the Board, relying on *Marathon Electric Mfg. Corp.*, 106 NLRB 1171, enforced, 223 F. 2d 338 (C.A. D.C.), certiorari denied, 350 U.S. 981, concluded that the Company did not violate Section 8(a)(5) and (1) of the Act by rescinding the collective bargaining agreement (Pet. App. 71a-74a).

Finally, because a strike in violation of a no-strike clause is not protected collective activity, the Board found that the Company did not violate Section 8(a)(3) and (1) of the Act by discharging the strikers (Pet. App. 75a-76a). And it held that once the Company had validly terminated the strikers, it was entitled to withdraw recognition from the Union based upon the petition signed by a majority of the employees (*id.* at 76a). The Board therefore decided that no remedial order should be entered (*id.* at 77a-79a).

3. The court of appeals sustained the Board's findings that the Company committed an unfair labor practice by unilaterally announcing a work change, and that the strike was improper because the Union failed to exhaust the grievance procedure and did not file a written request for arbitration (Pet. App. 12a). The court remanded the case to the Board, however, to consider the effect of *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, and other recent developments, on the propriety of the Company's post-strike actions (Pet. App. 3a, 27a-28a).

The court declined "to resolve this case by simply pigeonholing it as within the rule of *Mastro Plastics* or that of *Arlan's*" (Pet. App. 13a), writing that it perceived fundamental developments in national labor policy since those cases were decided that "militate against reliance solely on *Mastro Plastics* or *Arlan's* in determining whether the company's post-strike actions were permissible" (*ibid.*). The court added (Pet. App. 24a):

> Given *quid pro quo* arbitration and no-strike provisions in a collective bargaining agreement, we would have no difficulty in concluding that an employer's failure to seek a *Boys Markets* injunction against a strike violating a no-strike clause would be an appropriate factor to consider in determining whether subsequent actions were permissible under the National Labor Relations Act. Thus, the availability of a *Boys Markets* injunction effects a *pro tanto* modification of the *Arlan's* rule.

The court acknowledged that a *Boys Markets* injunction would have been unavailable to the Company in the instant case, because the arbitration provision of the contract was elective (Pet. App. 24a).The court concluded, however, that "compliance with the grievance procedure was mandatory" (*ibid.*) even though arbitration was not compulsory. In the court's view, the Company had not fully discharged its obligations under this procedure (Pet. App. 25a-26a) and "the Board should have considered as a factor the company's failure to seek peaceful resolution through the grievance procedure and in the arbitral forum" (*id.* at 27a-28a).

ARGUMENT

The question whether an employer must "turn the other cheek" to an illegal strike, attempting to force the Union to comply with a grievance process the Union

initially abjured, rather than to utilize its traditional economic weapons, may require resolution by this Court in an appropriate case. We submit, however, that this is not such a case.

The court of appeals did not hold that the Company's acts in this case were necessarily unlawful. It simply remanded the case to the Board for further consideration in light of *Boys Markets* and other recent developments, stating that the Board had given insufficient consideration to the Company's decision not to press on to arbitration. Although the Board is prepared to defend its original decision should the Court grant the petition in this case,[3] the Board accepted the remand rather than seek review by this Court. The Board will reconsider its position, as the court of appeals has directed.[4] Review of this case would be appropriate, if at all, only after that process has been completed.

---

[3]The union's no-strike pledge ordinarily is a *quid pro quo* for the employer's pledge to arbitrate grievances. *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 382; *Buffalo Forge Co.* v. *United Steelworkers of America*, No. 75-339, decided July 6, 1976, slip op. 9.

[4]In *Buffalo Forge*, *supra*, this Court disapproved (slip op. 6 n. 9, 10 n. 10) certain decisions of the Third Circuit cited in the decision below (Pet. App. 20a-25a) and held that a *Boys Markets* injunction was not available where "the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract" (slip op. 9-10). On remand, the Board will have an opportunity to reconsider its decision in light of both *Boys Markets* and *Buffalo Forge*, and to determine whether the latter decision affects its analysis.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

PETER BERNSTEIN,
Attorney,
National Labor Relations Board.

AUGUST 1976.

DOJ-1976-08